



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

AFLG-PRO

18 Aug 99

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 99-36, Protest
Involving Past Performance Information as an Evaluation Factor

1. We provide the enclosed sustained protest that discusses scoring the lack of performance history in evaluating past performance. The contracting officer placed an order at a significant price premium for the sole reason that the vendor quoting at a lower price had no prior performance history in supplying the item being procured. The determination was not in accordance with the stated evaluation factors.

2. For additional information, please contact Irene Hamm
hammi@forscom.army.mil or 404/464-5632.

A handwritten signature in black ink, appearing to read "Toni M. Gaines", is positioned above the typed name.

Encl

TONI M. GAINES
Chief, Contracting Div, DCSLOG
Principal Assistant Responsible
for Contracting

National Aerospace Group, Inc.
281958; B-281959
May 10, 1999

DIGEST

Placement of an order at a significant price premium for the sole reason that the vendor quoting a lower price has no prior performance history in supplying the item being procured was unreasonable, where determination was not made in accordance with the stated evaluation scheme.

DECISION

National Aerospace Group, Inc., protested issuance of purchase orders for sheet metal to other firms under two requests for quotations (RFQ) by the Defense Logistics Agency (DLA), Defense Industrial Supply Center (DISC). National argued that its quotations represented the best value under the two RFQs. The General Accounting Office (GAO) sustained National's protest of the order one RFQ, and denied National's protest the second RFQ.

The first RFQ was a simplified acquisition using the agency's automated purchase procedures. Under these procedures, RFQs are transmitted directly to an electronic bulletin board (EBB) maintained by the agency. Firms desiring access to the EBB to review the RFQs and to submit quotations are required to first register with the agency by completing a small purchase agreement (SPA). Once registered, vendors can then access the EBB either through a service or using their own personal computers via the internet. The SPA, that every supplier must sign in order to obtain a password to submit quotations on the EBB, and that was applicable to this RFQ, provided as follows: DISC purchases at or below the simplified acquisition threshold (SAT) are subject to Best Value Buying techniques. This includes, but is not limited to, the Blue Chip Vendor Program, the Delivery Evaluation Factor Program, and contracting officer's individual determinations based on a comparative assessment of pertinent circumstances, including past performance, delivery and product quality. DISC Small Purchase Agreement, Modification to the first RFQ sought prices for metal sheets with a specified dimension for delivery within 120 days after the date of order. The agency received four acceptable quotations in response to the first RFQ. National submitted the low quotation at a price of \$10,500, with delivery within 45 days from the date of the order. Tara Metals submitted a quotation of \$13,083 with delivery within 70 days from the date

of order. The agency evaluated vendors under the Automated Best Value Model (ABVM). The ABVM is an automated system that collects a vendor's past performance data for a specific period and translates it into a numeric score. Tara had an ABVM score of 95.4. National, a relatively new supplier was given a rating of 999.9 because it lacked a performance history for this item. Under the ABVM procedures, a supplier with no performance history is assigned a rating of 999.9, that is referred to in the record as a neutral rating

The record also included a facsimile sent at 9:15 a.m. on January 20, 1999 from National responding to an inquiry from the agency in which National advised the agency that the "material quoted as called out . . . no exceptions We have in stock." The award justification document signed and dated on January 20, 1999, was a preprinted form that permitted the contracting officer to select one of a variety of reasons for the award. Here, in pertinent part, the contracting officer completed the form as follows: 'Lower priced offer(s) not selected because: . . . Other score(s) not a true indicator of performance because score(s) based on too few contract line items."

There is no other contemporaneous award documentation. In the contracting officer's statement, the contracting officer stated that, "essentially, the contracting officer determined that Tara, who had a composite ABVM score of 95.4 represented a lesser risk of nonperformance than did National who had a neutral rating of 999.9 because it is a relatively new supplier."

National argued that the award to Tara was unreasonable and not supported by the record. National pointed out that its quotation was significantly less expensive than Tara's; that it quoted a shorter delivery time than Tara; and that in response to the agency's apparent concern about its capability to supply the item, it confirmed that it could furnish the item. National argued that it was improperly penalized without any justification for a lack of previous performance history. National asserted that the agency's selection decision violated the ABVM notice provision that provided, in pertinent part, that "an ABVM score does not determine an offeror's award eligibility, or technical acceptability," and that "new offeror status will not be grounds for disqualification for award."

Simplified acquisition procedures are designed to, among other things, reduce administrative expenses, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors. Federal Acquisition Regulation (FAR) § 13.002. Although the procedures for simplified acquisitions do not require detailed justifications supporting a best value determination, the FAR requires that the contracting officer evaluate quotations on the basis established in the solicitation and support the award decision if other than price-related factors were considered in selecting the supplier. FAR Part 13.106-2(a)(2), 13.106-3(b)(3)(ii). Thus, even when using such procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. In reviewing protests against an allegedly improper simplified acquisition evaluation and selection decision, the GAO examined the record to determine whether the agency met this standard and exercised its discretion reasonably. The GAO concluded that the selection decision was flawed because it is inadequately supported and was not based on the criteria announced in the SPA. The SPA, that established the terms and conditions for this EBB acquisition, stated that the contracting officer would use best value techniques and make an individual determination based on a comparative assessment of pertinent circumstances, including past performance, delivery and product quality. The contracting officer stated that she used the ABVM to perform this comparative assessment. As quoted above, the sole reason for paying a significant price premium for Tara was that National's ABVM score was not a true indicator of past performance because it was based on too few contract lines. In a recent case involving DLA's use of ABVM scoring, the GAO concluded that the use of a neutral rating approach to avoid penalizing a vendor without prior experience does not preclude a determination to award to a higher-priced firm with a good past performance record over a lower priced vendor with a neutral past performance rating. Indeed, such a determination is inherent in the concept of best value. Phillips Indus., Inc., B-280645, Sept. 17, 1998, 98-2 CPD ¶ 74 at 5. In Phillips, the contracting officer's determination to select a higher priced vendor with an excellent ABVM score, rather than a new supplier with a neutral rating, was reasonable where the record in that case showed that the agency had backorders for the item and timely delivery was critical.

Nonetheless, GAO expressed concern that the vendor without a performance history not be disqualified from award merely because it lacked a performance history; GAO pointed out that such an approach would be inconsistent with the FAR and the DLA ABVM clause. As DLA recognized in that case, FAR § 15.305(a)(2) provides that in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. See 41 U.S.C. § 405(j)(2) (1994). The ABVM clause states that lack of performance history is not grounds for disqualification for award.

There is nothing in the record to show that the contracting officer performed a comparative assessment of the vendors. The contracting officer merely checked a box on a form indicating that National was not selected because its 999.9 ABVM score was based on insufficient information and, therefore, was not a true indicator of its capabilities. Nor was there any indication that the contracting officer performed a trade-off that considered the significant price premium in ordering from Tara, or that the contracting officer considered in the decision that National quoted a significantly shorter delivery time and confirmed that the metal sheets were in stock. Unlike in Phillips, there is no indication here that the item was in backlog or high demand status or that timely delivery was critical and worth the price premium to avoid the risk of using a vendor with no performance history. The GAO concluded that the contracting officer failed to make a meaningful best value determination consistent with the SPA to justify paying a significant premium to Tara. As a result, DLA's decision was tantamount to rejecting National's quotation based on its lack of past performance history, which is inconsistent with 41 U.S.C. § 405(j)(2), FAR § 15.305(a)(2), and the clauses which implement the ABVM program, as discussed in the Phillips decision. The GAO sustained National's protest of the order to Tara under the first RFQ.

The GAO denied National's protest of the order to Airport Metals under the second RFQ. Airport Metals was the low priced vendor, had an ABVM score of 98.4, and quoted a significantly shorter delivery time than National. The GAO determined that the contracting officer's selection of Airport Metals in these circumstances was amply justified. Although National challenged Airport Metals' ABVM score, the GAO had no basis to question the score on this record.

For the first RFQ, the GAO recommended that the contracting officer perform a proper best value determination consistent with this decision, and issue an order appropriate with that best value determination. National should be reimbursed the costs of filing and pursuing its protest of the first RFQ, including attorneys' fees. National should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1). The protest regarding the first RFQ was sustained; the protest regarding the second RFQ was denied. Comptroller General of the United States